

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GUSTAVO PEREZ,

No. C-09-3843 TEH (PR)

Petitioner,

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS; DENYING
CERTIFICATE OF APPEALABILITY

v.

BEN CURRY, Warden,

Respondent.

Petitioner filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he claimed that a decision by the Board of Parole Hearings to find him not suitable for parole violated his right to due process because it was not supported by sufficient evidence. Doc. #1. Respondent has filed an answer and supplemental answer and Petitioner has filed a traverse and supplemental traverse. Doc. ## 7, 12, 14 & 15.

The United States Supreme Court recently made clear that in the context of a federal habeas challenge to the denial of parole, a prisoner subject to a parole statute similar to California's receives adequate process when BPH allows him an

1 opportunity to be heard and provides him with a statement of the
2 reasons why parole was denied. Swarthout v. Cooke, 131 S.Ct. 859,
3 862-63 (2011) (per curiam). Here, the record shows Petitioner
4 received at least this amount of process. See Doc. #1 at 48-125;
5 id. at 115-125. The Constitution does not require more. Swarthout,
6 131 S.Ct at 862.

7 The Court also made clear that whether BPH's decision was
8 supported by some evidence of current dangerousness is irrelevant in
9 federal habeas: "it is no federal concern . . . whether
10 California's 'some evidence' rule of judicial review (a procedure
11 beyond what the Constitution demands) was correctly applied."
12 Swarthout, 131 S.Ct at 863. Accordingly, the instant federal
13 petition for a writ of habeas corpus is DENIED.

14 Further, a Certificate of Appealability is DENIED. See
15 Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner
16 has not made "a substantial showing of the denial of a
17 constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner
18 demonstrated that "reasonable jurists would find the district
19 court's assessment of the constitutional claims debatable or wrong."
20 Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not
21 appeal the denial of a Certificate of Appealability in this Court
22 but may seek a certificate from the Court of Appeals under Rule 22
23 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the
24 Rules Governing Section 2254 Cases.

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1 The Clerk shall terminate any pending motions as moot,
2 enter judgment in favor of Respondent and close the file.
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5 IT IS SO ORDERED.

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7 DATED

03/04/2011

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THELTON E. HENDERSON
United States District Judge